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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 424.

I. A. WATSON, JR., T. W. NORTHCROSS, SR., W. D. SPEIGHT, JR., A. E. HORNE, SR., MELVIN MALUNDA, JOHNNY GHOLSTON, HAROLD GHOLSTON, ALFRED HAYNES, JR., JOHN ROGERS, THOMAS PUGH and CURTIS KING, on Behalf of Themselves and Others Similarly Situated, Petitioners,

vs.

CITY OF MEMPHIS, a Public Body Corporate, ET AL., Respondents.

BRIEF OF RESPONDENTS.

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vs.

CITY OF MEMPHIS, a Public Body Corporate, ET AL., Respondents.

BRIEF OF RESPONDENTS.

QUESTION PRESENTED.

Do the principles of equity, as announced in **Brown v. Board of Education, 349 U. S. 294**, which allowed delay in effecting desegregation of public educational facilities, have any application in any case involving public recreational facilities?

STATEMENT OF THE CASE.

The size and scope of the public parks and recreational facilities operated by respondents and the extent of desegregation already carried out on a voluntary basis over the last several years are fully set out in Opinion of the Court of Appeals (R. 111), Findings of Fact of the District Court (R. 91, 92, 93, 94), and in respondents' Brief in Opposition to Petition for Certiorari. The specific factors which entered into the determination by both the District Court and the Court of Appeals that respondents were acting in good faith in recognizing the constitutional rights of Negroes to make use of all public parks and recreational facilities in the City of Memphis on a desegregated basis are set out clearly in the Findings of Fact of the District Court (R. 94, 95, 96) and in the Opinion of the Court of Appeals (R. 111).

In their brief filed in the Court of Appeals, petitioners made no attack on the District Court's Findings of Fact. The good faith of respondents was not even questioned (R. 122). In the petition for certiorari filed in this Court, the sole question presented was:—

> "Whether the courts below erred in holding that principles stated in **Brown v. Board of Education**, 349 U. S. 294, which allow delay in desegregating public schools, apply to this case which involves desegregating public recreational facilities."

ARGUMENT.

One would conclude, from reading petitioners' brief, unless he studied it very closely, that the Court of Appeals did not pass on the Findings of Fact and conclusions therefrom which were handed down by the District Court. The fact is that the Opinion of the Court of Appeals, in and of itself, presents a full answer to all of petitioners' arguments and contentions.

In concurring with the District Court's factual finding of good faith on the part of respondents, the Court of Appeals observed:—

> "Considering the great number of parks, playgrounds, and recreational facilities maintained by the City of Memphis; the remarkably large number of children—65,000 white children and 35,000 Negro children—participating in the program under the guidance of trained supervisors and directors of planned recreation; the circumstances showing a substantial desegregation of many of the City's recreational facilities, prior to the hearing in the district court, and a continuing program of desegregation since that time; the evidence that immediate desegregation of all of the City's parks, playgrounds, and recreational facilities would result in great damage to the organized system of play for many children, and the probable closing of a number of recreational facilities, due to the necessity of providing considerable additional police protection and park supervision; the past and present success of the continuing plan of desegregation now being peacefully and harmoniously carried out by the City; **the unquestioned good faith of the officials of the City and Park Commission in attempting to comply, in the field of recreation, with the opinion of the Supreme Court in Brown**

v. Board of Education, both before the hearing of this case in the district court, and since that time; the requirement that the Park Commission file a plan for desegregation of the City's park and recreational system to be subject to the approval of the district court; the fact that this appeal was taken before the plan, ordered by the court, was filed, and that the district court has never had an opportunity to approve or disapprove such a plan—these considerations require a deter- [fol. 142] mination that, under the circumstances of this case, there was a proper exercise of discretion by the district court in denying injunctive relief, in providing for a plan of desegregation to be filed by the Park Commission with the court, and in reserving jurisdiction for further proceedings in the case; and in accordance with the foregoing, the judgment of the district court is affirmed on the findings of fact and conclusions of law of Judge Boyd." (Emphasis supplied) (R. 122).

The main thrust of petitioners' brief and argument on the merits is that this record does not justify a finding of "good faith compliance at the earliest practical date" or "good faith implementation of the governing constitutional principles."

In the face of the concurrent findings of "unquestioned good faith" of respondents, petitioners, now, for the first time, raise a question of fact, which, if determined by this Court, would require a consideration of all the evidence introduced by respondents at the trial, including much evidence that was not printed in the record filed either in the Court of Appeals or in this Court. It is submitted that all questions of fact with respect to "good faith compliance by respondents with the governing constitutional principles" are now foreclosed, under fundamental rules long established by this Court.

In **Comstock v. Institutional Investors, 335 U. S. 211, at pp. 213-214**, this Court said:

> "The issues of fact, contested in [illegible]ring, are not before us for review. Petitioner assured us, in support of the petition for certiorari here, that 'there is no factual controversy before this Court' and 'we assume the findings of the District Court. Our challenge is directed only to the legal import of these unchallenged facts.'
>
> Much of petitioner's argument seems to depart from these assumptions and to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

In **Lawn v. United States, 355 U. S. 339, at p. 362 (footnote 16)**, the Court said:—

> "Moreover, the question was not mentioned in the petition for certiorari filed in this Court. Our Rule 23 (1) (c) provides, in pertinent part: 'Only the questions set forth in the petition or fairly comprised therein will be considered by the court.' The question is not properly here. Cf. Irvine v. California, 347 U. S. 128, 129, 98 L. ed. 561, 567, 74 S. Ct. 381."

The applicable rule is stated by Mr. Justice Douglas in **Anderson v. Abbott, 321 U. S. 349, at p. 356**, as follows:—

> "The District Court found, and the Circuit Court of Appeals agreed, that Banco was organized in good faith and was not a sham; * * *. Some of these findings have been challenged. But we do not stop to examine the evidence. We accept those findings, as they were concurred in by two courts and no clear error is shown."

We shall not detail the evidence showing the various factors that influenced the District Court and the Court of Appeals in reaching a determination of the issues of fact. It is sufficient to say, as found by both lower courts, that the evidence showed great problems of administration and supervision would be created by sudden, massive integration of all parks and recreational facilities operated by the City of Memphis; whereas, these problems could be handled in the best interest of all the people if pursued from a gradual approach (R. 94, 95, 96, 105).

No proof, whatever, was offered by petitioners to support their insistence that immediate and total desegregation of all parks and recreational facilities was the best or proper way to implement their constitutional right to make use of all public recreational facilities on a desegregated basis. In that situation, only a question of law, based upon settled findings of fact, remain.

Do the principles of equity, as announced in Brown v. Board of Education, 349 U. S. 294, which allowed delay in effecting desegregation of public educational facilities, have any application in any case involving public recreational facilities?

The question presented to this Court, necessarily, narrows itself to the proposition: Was the District Court (and the Court of Appeals) compelled, as a matter of law, to enter an order requiring respondents to integrate the races immediately in all public parks and recreational facilities in the City of Memphis, notwithstanding the undisputed and unquestioned proof that it would be manifestly unwise to do so?

Neither the Court of Appeals nor the Trial Court has had an opportunity to approve or disapprove of respondents' plan for complete integration of all the facilities in question. The appeal below from the District Court was

taken before a complete plan could either be filed or acted upon.

Respondents do not question the settled and established principle of constitutional law that Negroes are entitled to make use, on a desegregated basis, of all public parks and recreational facilities in the City of Memphis. Inherent in the rulings of both lower courts was the fact that respondents have recognized this constitutional principle and are implementing it in a manner that is in the best interest of all the citizens of Memphis, both Negro and white.

The crux of petitioners' argument, on the principle of law herein involved, is that the administrative difficulties present in desegregating systems of public education would not arise in transforming a public recreational system. In petitioners' brief on the merits, at page 11, it is stated:—

> "In sum, the administration of a park system is less complex. Effectuation of complete desegregation of public parks requires little more than the removal of racial signs, and an announcement that racial distinctions will no longer be observed."

The proof in this case, as found by both of the lower courts, does not justify petitioners' purported statement of fact; but, on the contrary, the proof, as found by the lower courts, reflects that many administrative problems, as well as other difficulties, specifically set out in the District Court's Findings of Fact, would be created by immediate and total integration of all facilities, which could be avoided by a planned, orderly system of desegregation. Perhaps the most difficult phase of the desegregation problem is that part of respondents' activities dealing with summer supervised play carried out by the Recreation Department of the Memphis Park Commission. On this point, the Court of Appeals said:—

"The City of Memphis has a population of approximately 500,000 people, of whom 63% are white, and 37% are Negro. Approximately 100,000 children participate in one or more of the recreational activities sponsored by the Memphis Park Commission and carried on through its Recreational Department. This is a remarkable civic achievement on the part of the City of Memphis and its citizens. Of the 100,000 children participating, approximately 65,000 are white, and 35,000 are Negro. The Department sponsors many and varied types of recreational activities, including, but not limited to, competitive sports, such as baseball and basketball, as well as dancing and similar activities. The Recreational Department headquarters is itself operated on an integrated basis. All Negro Supervisors and Directors are paid on the same salary schedule as the white Supervisors and Directors; and the qualifications of white and Negro Supervisors and Directors are the same. The Recreational Department of the Memphis Park Commission is rated by competent authorities as the best in the South; and its recreational program for Negroes as the finest in the country" (R. 113).

The Superintendent of the Park System, in considerable detail, based on a survey of other cities and his experience of sixteen years as head of the Memphis Park System, testified that immediate forced integration of all the recreational facilities in Memphis would, necessarily, require many more Supervisors and instructors for the supervised playgrounds than are now available; and that the inevitable result would be a drastic reduction in the number of children, white and Negro, who could be afforded the benefits of supervised summertime play (R. 72, 73, 74). The likelihood of increase in juvenile delinquency, by throwing many children on the streets during the summer vacation season, is self evident; and it was shown in the proof

that one of the primary functions of the Recreation Department is to cope with this problem of juvenile delinquency.

Other testimony was adduced relating to various phases of the operation of the Memphis Park System. For present purposes, it is obvious that a vast system affecting the daily lives of over 500,000 people will have many administrative difficulties, if the relief prayed for by petitioners be granted. Petitioners contend that since Memphis has been free of racial disturbances in the past, upon desegregation of various public facilities, no delay in the field of recreation is warranted. This should be the best argument in favor of the moderate and gradual approach adopted by respondents. Good will and harmony in racial relations have prevailed in Memphis because of sound planning, in all phases of community life, that has taken into account the interests of all the citizens without overlooking the constitutional principles settled by this Court in the first **Brown** decision.

Several cases are cited by petitioners in support of their present position. A review of these indicates that none has any application here.

McLaurin v. Oklahoma State Regents, 339 U. S. 637;
Sweatt v. Painter, 339 U. S. 629;
Sipuel v. Board of Regents of University of Oklahoma, 332 U. S. 631;

(all decided prior to the **Brown Case**); and

Florida ex rel. Hawkins v. Board of Control, 350 U. S. 413;

each involved the right of a single Negro to immediate admission to a State graduate school. In none of the cases was any reason for delay advanced.

In **Booker v. State of Tennessee Board of Education, 240 Fed. 2d 689 (Sixth Circuit, 1957)**, five plaintiffs sought

immediate admission to graduate school of Memphis State University. A five-year plan was sponsored by the school. Judge Allen, for the Court of Appeals, pointed out that no valid reason for delay was given; that the school was admitting non-resident white students and further that Negro residents of Memphis would have to travel outside of the district to attend graduate school.

In **Mayor and City Council of Baltimore v. Dawson, 350 U. S. 877,** integration of bath houses and beaches in the City of Baltimore was sought. No plan of integration was presented to the trial court or considered. **123 Fed. Supp. 193.** The officials of Baltimore refused to recognize the constitutional rights of Negroes to make use of the recreational facilities in question on a desegregated basis, and their position throughout the litigation was that the doctrine of "separate but equal" facilities, as announced in **Plessy v. Ferguson, 163 U. S. 537,** applied.

On the other hand, the principles of equity, as announced in the second **Brown** decision, which are merely established rules for the formulation of decrees in equity, have been specifically applied in the field of public recreation.

City of Montgomery v. Gilmore, 277 Fed. 2d 364 (Fifth Circuit, 1960);

Cummings v. City of Charleston, 288 Fed. 2d 817 (Fourth Circuit, 1961).

To say that the **Brown Case** is limited to cases involving public educational facilities is tantamount to saying that a court of equity, in fashioning its decrees, has no discretion with respect to the manner in which it grants relief in cases involving large and complicated systems of public recreation. The **Brown Case** actually announced no new rule of equity; rather it recognized that:—

> "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by

a facility for adjusting and reconciling public and private needs."

(349 U. S. at p. 300.)

As pointed out by the Court of Appeals, the principles of gradual desegregation, as announced by this Court in the **Brown Case**, have been applied in the field of public housing in the City of Detroit.

Detroit Housing Commission v. Lewis, 226 Fed. 2d 180 (Sixth Circuit, 1955).

Under familiar rules, the rulings of the two lower courts will not be disturbed unless contrary to some rule of equity or the result of improvident exercise of judicial discretion.

Meccano, Ltd. v. John Wanamaker, 253 U. S. 136; National Fire Ins. Co. of Hartford v. Thompson, 281 U. S. 331.

The discretion of the lower courts is, necessarily, broad and a strong showing of abuse must be made to reverse it.

United States v. W. T. Grant Co., 345 U. S. 629.

Petitioners, who have no authority to represent the interests of the 35,000 Negro children who participate in the supervised play sponsored by respondents, would have this Court adjudicate that the only way in which their constitutional rights can be implemented is by a blanket immediate injunction that, under the proof, could work a great injustice on thousands of children, Negro and white. They would have the Court overlook all considerations, however important to the welfare of thousands of people, both white and Negro, in the face of "unquestioned good faith of the officials of the City and Park Commission in attempting to comply, in the field of recreation, with the opinion of the Supreme Court in Brown v. Board of Education."

The Court of Appeals appropriately made reference to the attitude of petitioners as follows:—

> "Appellants made no specified objections to the plan which the district court approved. As the court stated in its opinion:
>
> > 'No valid objection to this plan in the Court's opinion is offered in this case. The plaintiffs merely say they want all of these facilities fully integrated now. Nothing else seems to matter.' " (R. 119).

The plan referred to by the Court of Appeals was the partial plan presented by respondents to the District Court. As already stated, the full plan of integration was not before either the District Court or the Court of Appeals.

Respondents recognize that the Memphis Park System and its recreational facilities must, under established law, be operated on a desegregated basis, and that the former system must be changed in compliance with the law as announced by the Supreme Court. The only question herein involved is the manner in which this desegregation should take place. The proofs introduced upon the trial, as found by both lower courts, supports the conclusion that gradual integration, as opposed to immediate integration, is in the best interest of all the citizens of Memphis, both white and Negro. No proof to the contrary was offered.

PINK PALACE MUSEUM.

Because of the fact that there may be an enforceable right of re-entry, under Tennessee law, in persons not parties to this case, in event of desegregation of the Museum, the trial court simply remitted to the courts of Tennessee the determination of a question of state law. No question of constitutional law will arise if the state courts hold

that integration of the races will not work a forfeiture of the City's title. The action of the trial judge was consistent with many decisions of this Court.

Harrison v. NAACP, 360 U. S. 167;
Thibodaux v. Louisiana Power & Light Co., 360 U. S. 25;
Meridian v. Southern Bell Telephone & Telegraph Co., 358 U. S. 639.

CONCLUSION.

The District Court and the Court of Appeals have found from the evidence that respondents have acted and are acting in good faith in attempting to comply with the equitable principles announced in the **Brown Case**, and that the familiar rules of equity applied in that case were not limited to the narrow field of public education.

The action of the Court of Appeals, in affirming the judgment of the District Court, should be affirmed.

Respectfully submitted,

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